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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258

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REQUEST FOR STAY

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SUMMARY

Preferred Communication Systems, Inc. ("Preferred" or the "Company") requests that the Commission stay the effectiveness of its rules and regulations governing the relocation of Specialized Mobile Radio ("SMR") licensees adopted in its Rebanding Orders in WT Docket 02-55.[1] A stay is necessary to prevent continued harm to Preferred and similarly situated companies licensed by the Commission to operate in the FCC's 800 MHz spectrum band. Denial of the stay will allow damage to continue to accrue to the Company – the rebanding process has already begun for Preferred as of June 27, 2005 -- and result in a *fait accompli* in the changed licensing environment while the serious legal issues raised regarding the Rebanding Orders undergo judicial review.

Preferred holds geographic Basic Economic Area licenses ("EA Licenses") awarded pursuant to the Commission's competitive bidding procedures. Preferred paid the FCC approximately $31.7 million for its EA Licenses. In addition, Preferred holds certain authorizations licensed under Part 90 the Commission's Rules to specific locations (the "Site Licenses"), principally in Puerto Rico. Preferred and similarly situated holders of EA Licenses and Site Licenses will suffer irreparable injury in large measure because Nextel Communications, Inc. ("Nextel")[2] has insufficient spectrum to accommodate the relocated licenses.

The Supplemental Order affects Preferred by changing the Commission's treatment of Non-Nextel EA licensees' geographic licenses such as those of Preferred by adopting the so-called "Cellular Deployment Test" as a condition for retaining these Non-Nextel EA licensees' purchased

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1 *In the Matter of Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd. 14969 (2004), as amended by *Erratum*, released September 10, 2004, *Erratum*, DA 04-3208, 19 FCC Rcd. 19651 and *Erratum*, DA 04-3459, released October 29, 2004 ("Rebanding Order"), *Supplement and Reconsideration*, 19 FCC Rcd 25120 (2004) (the "Supplemental Order"), *Memorandum Opinion and Order*, FCC 05-174, released October 5, 2005 (hereinafter the "Reconsideration Order") (collectively the "Rebanding Orders")

2 For purposes of the Request for Stay, unless otherwise indicated, the term "Nextel" includes Nextel Communications, Inc., Nextel Partners, Inc. and all other affiliates or entities considered as part of Nextel Communications, Inc. or entitled to the same benefits as Nextel Communications, Inc, under the terms of the Rebanding Orders.

spectrum right to deploy a low site and low power cellular architecture system, by which Preferred could offer commercial push-to-talk and cellular voice service on a competitive basis with Nextel and affiliated carriers. The effect of the Cellular Deployment Test and such retroactive deadlines is to deprive Preferred of rights previously granted to the Company under the rules for its licenses in effect at the time that Preferred bid in the Commission's auction for the EA licenses.[3]

Preferred is already suffering the ill effects of the rules adopted in the Rebanding Orders. Studies prepared by Concept to Operations, Inc.[4] confirm that there are insufficient channels to accommodate the EA licenses purchased at auction (CTO Report, p. 15). The 280 channels that the Rebanding Orders set aside (not including the 40 channel Guard Band channels for 401-440) cannot accommodate the 430 BEA channels purchased at auction. Further, the CTO Report confirms Preferred's previously stated contention that Nextel lacks sufficient channels within channels 121-400 to accommodate every non-Nextel Site License affected by the relocation imposed by the Rebanding Orders (CTO Report at 2). (CTO Report at 3, 11).

Further, implementing the changes requires that Preferred establish accurately what were the "originally licensed" contours (as defined in Section 90.693 of the Commission's Rules) of incumbent licensees (i.e., Nextel and others) in Preferred's EAs. In EA markets in which Preferred holds EA and/or Site-Licensed channels, if rebanding is allowed to proceed as set forth in the several Rebanding Orders, the Company will encounter either loss of total frequencies or spectrum rights, or both, because of the shortfall of spectrum to provide comparable facilities to which Preferred is entitled, either of which deprives Preferred of the full use of the spectrum that it acquired at auction.

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3 Further, although Preferred can move both its EA licenses and Site Licenses into the ESMR band, Reconsideration Order, at ¶ 25, the coverage footprint of the Site Licenses is limited to the same "white space" that Preferred had before adoption of the rebanding plan. Supplemental Order at ¶ 79; Reconsideration Order, at ¶¶ 23, 25.

4 *See* Exhibit 1 to the Request for Stay. The report is hereinafter referred to as the "CTO Report").

Preferred's request for stay meets the criteria for grant of a stay, as set forth in *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), as modified (irreparable injury incurred, substantial legal questions presented, no harm caused to other parties, no harm caused to public interest).

As an initial matter, Preferred will suffer an irreparable injury if a stay is not imposed. Once the Commission has forced the rebanding of the EA licenses, Preferred will have no remedy at law to compensate for what will be unrecoverable losses – the serious reduction or even elimination of the value of licenses for which Preferred paid the FCC nearly $32 million in reliance on rules adopted by the agency -- if the rules and rebanding process already underway are not stayed. With the rebanding process already underway, this constitutes an irreparable injury likely to occur. Moreover, the failure to grant a stay, in light of the insufficient amount of spectrum to allow for the rebanding, which would result in Preferred and other EA and Site License holders being forced off their spectrum without receiving comparable spectrum. The threat of such unrecoverable economic loss clearly qualifies as irreparable harm. Preferred cannot simply bring suit to recover damages.

Preferred's petition for review raises serious legal issues that warrant a stay pending this Court's review. The Commission's substantially disparate treatment of Nextel and related parties on the one hand and Preferred and other EA licensees through grant of exclusive spectrum rights in the Rebanding Order in the 1.9 MHz band to Nextel, combined with the grant in the original Rebanding Order and at the expense of other commercial mobile radio service providers like Preferred, is arbitrary and capricious because it constitutes unequal treatment of similarly situated parties.

Further, Preferred will *inter alia* be able to demonstrate that the Commission has engaged in prohibited retroactive rulemaking as a result of the imposition of the Cellular Deployment Test, the effect of which is to deprive Preferred and similarly situated EA licensees of rights previously granted them under the rules for their licenses in effect at the time that Preferred bid in the

Commission's auction for the EA licenses, and which conditions are not being imposed on other EA licensees under the Supplemental Order.

No interested party will suffer substantial harm if the subject request for stay is granted. Nextel, will not lose any spectrum or licenses as a result of the stay pending judicial review of the rules under review. The same could not be said of Preferred if there were no stay granted.

Finally, the public interest is served by staying a process that will ultimately work to the detriment of the public's interest in safe, reliable communications in the 800 MHz band.

Preferred has demonstrated that the Commission should stay the effectiveness of the rules adopted in the Rebanding Orders pending disposition of judicial review of those rules.

REQUEST FOR STAY

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REQUEST FOR STAY

Preferred Communication Systems, Inc. ("Preferred" or the "Company"), by and through undersigned counsel, pursuant to Sections 1.41 and 1.43 of the Commission's Rules,[1] hereby requests that the Commission stay the effectiveness of its rules and regulations governing the relocation of Specialized Mobile Radio licensees adopted in its Rebanding Orders in WT Docket 02-55.[2] As set forth below, Preferred has demonstrated compliance with the standards of for grant of equitable relief in the form of a stay, as originally laid out in *Virginia Petroleum Jobbers Ass'n v. F.P.C.*,

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1 47 C.F.R. §§ 1.41, 1.43.

2 *In the Matter of Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd. 14969 (2004), as amended by *Erratum*, released September 10, 2004, *Erratum*, DA 04-3208, 19 FCC Rcd. 19651 and *Erratum*, DA 04-3459, released October 29, 2004 ("Rebanding Order"), *Supplement and Reconsideration*, 19 FCC Rcd 25120 (2004) (the "Supplemental Order"), *Memorandum Opinion and Order on Reconsideration*, FCC 05-174, released October 5, 2005 (hereinafter the "Reconsideration Order") (collectively the "Rebanding Orders")

259 F.2d 921 (D.C. Cir. 1958), and as adopted by the Commission.[3] Equitable relief in the form of a stay is necessary to prevent continued harm to Preferred and similarly situated companies licensed by the Commission to operate in the FCC's 800 MHz spectrum band. Denial of the stay will allow damage to continue to accrue immediately to the Company – the rebanding process has already begun for Preferred as of June 27, 2005 -- and result in a *fait accompli* in the changed licensing environment while the serious legal issues raised regarding the Rebanding Orders undergo judicial review. Further, failure to grant a stay would complicate any meaningful remedy, in light of the moving target presented by the ongoing relocation of licenses of Preferred and other licensees in the 800 MHz spectrum band. In support whereof, the following is respectfully set forth.

FACTUAL BACKGROUND

Preferred is the licensee of radio systems in the Commission's Specialized Mobile Radio Service, or SMR. SMR licensees use bandwidth in the 800 MHz and 900 MHz ranges to provide "land mobile communications services" on a commercial basis.[4]

Preferred holds geographic Basic Economic Area licenses ("EA Licenses") awarded by the FCC under Parts 1 and 90 of the FCC Rules and Regulations pursuant to its competitive bidding procedures.[5] The EA Licenses authorize the provision of commercial mobile service, as defined by Section 332 of the Act.[6] Preferred's EA Licenses encompass a total population of approximately 29.4 million people in the District of Columbia and parts of California, Oregon, Virginia, West Virginia, Maryland, Pennsylvania, Kentucky, Ohio, North Carolina, Puerto Rico and the U.S. Virgin Islands ("Preferred Markets"). Preferred paid the FCC approximately $31.7 million for its EA

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3 *See generally Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998 Personal Communications Service Block C Election in WT Docket No. 97-821*, 12 FCC Rcd 1180 (1998).

4 47 C.F.R. § 90.7.

5 47 U.S.C. § 309(j); 47 C.F.R. Parts 1, 90.

6 47 U.S.C. § 332.

Licenses.[7] In addition, Preferred holds certain authorizations licensed under Part 90 the Commission's Rules to specific locations (the "Site Licenses").[8] These Site Licenses are located primarily in Puerto Rico. Approximately nineteen (19) of these Site Licenses fall within the EA License (FF Frequency Block) awarded to Nextel Communications, Inc. ("Nextel") in the Puerto Rico EA and largely encumber that authorization.[9]

The regulatory changes implemented by the Rebanding Orders enhance the suitability of 800 MHz spectrum held by Nextel certain other competitive providers of commercial mobile wireless service[10] at the expense of Preferred and other EA and site-based 800 MHz SMR licensees; specifically including the licenses in the Preferred Markets and the Site Licenses held by Preferred in Puerto Rico. Consequently, Preferred will suffer injury if the Commission's rules and regulations adopted in the Rebanding Orders are ultimately affirmed on judicial review.

Specifically, the Supplemental Order affects Preferred by changing the Commission's treatment of Non-Nextel EA licensees' geographic licenses such as those of Preferred by adopting the so-called "Cellular Deployment Test" as a condition for retaining these Non-Nextel EA licensees' purchased spectrum right to deploy a low site and low power cellular architecture system, by which Preferred could offer commercial push-to-talk and cellular voice service on a competitive basis with Nextel and affiliated carriers. The Supplemental Order also retroactively imposed a construction deadline on certain EA licensees, including Preferred, retroactive to the Federal

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7 *Public Notice*, "800 MHz Specialized Mobile Radio (SMR) Service -- General Category (851-854 MHz) and Upper Band (861-865 MHz) -- Auction Closes," Report No. AUC-34-G (Auction No. 34), DA 00-2037, released September 6, 2000.

8 47 C.F.R. Part 90.

9 For purposes of this Request, unless otherwise indicated, the term Nextel includes Nextel Communications, Inc., Nextel Partners, Inc. and all other affiliates or entities considered as part of Nextel Communications, Inc. or entitled to the same benefits as Nextel Communications, Inc, under the terms of the Rebanding Orders.

10 In addition to Nextel the principal other beneficiary of the special treatment afforded by the Rebanding Orders is Southern LINC Wireless ("Southern LINC"). The reference herein to "Non-Nextel Licensees" refers to those licensees other than Nextel and SouthernLINC.

Register publishing date of original Rebanding Order, November 22, 2004.[11] The effect of the Cellular Deployment Test and such retroactive deadlines is to deprive Preferred of rights previously granted to the Company under the rules for its licenses in effect at the time that Preferred bid in the Commission's auction for the EA licenses.[12]

Preferred is already suffering the ill effects of the rules adopted in the Rebanding Orders. On June 27, 2005, the Commission began the reconfiguration of the spectrum band for licenses held by Preferred and similarly situated licensees in the District of Columbia, and all or parts of California, Oregon, Virginia, Maryland and Pennsylvania.[13] The Wireless Bureau, acting under delegated authority to implement the rebanding plan, cited specifically to the Supplemental Order as authority for relocation of licenses to different spectrum, including Preferred licenses and commencement of negotiations regarding technical adjustments to those licenses within 18 months.[14] Thus, the rebanding process, where EA Licenses and Site Licenses will be permanently modified, is already underway. However, even if already underway, the process is already fraught with problems which will make it impossible to complete without substantial injury to Preferred and other EA and Site License holders.

As the rebanding process unfolds it has become more and more apparent that the Preferred and other licensees to be relocated are facing what can only be described as the overbooking of an oversold airline flight – there are far more licenses to be changed than there is available spectrum. The essential element of the rebanding plan is to move non-Nextel licensees to the frequencies

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11 Supplemental Order, at ¶ 78.

12 Further, although Preferred can move both its EA licenses and Site Licenses into the ESMR band, Reconsideration Order, at ¶ 25, the coverage footprint of the Site Licenses is limited to the same "white space" that Preferred had before adoption of the rebanding plan. Supplemental Order at ¶ 79; Reconsideration Order, at ¶¶ 23, 25.

13 "Wireless Telecommunications Bureau Announces that 800 MHz Band Reconfiguration Will Commence June 27, 2005, in the NPSPAC Regions Assigned to Wave 1 and Specifies 800 MHz Reconfiguration Benchmark Compliance Dates," *Public Notice*, DA 05-1546, released May 27, 2005.

14 *Id.*, at 2, n. 10.

currently occupied by Nextel in Channels 121-400 of the band. However, Nextel and SouthernLINC lack sufficient channels to allow this to occur, both with respect to EA Licenses and Site Licenses.

Preferred expressly raised this spectrum shortfall in its Petition for Reconsideration of the Rebanding Order, filed December 22, 2004 (See Exhibit A – "Analysis of the Relocation of Non-Nextel SMR, BILT and Public Safety Licenses in Channels 1-150 and 401-600 Under the FCC's Report and Order," as prepared by Concept to Operations, Inc. ("CTO"). On October 17, 2005, Preferred made an *ex parte* filing, in which it submitted a more recent report from CTO, dated October 10, 2005 ("CTO Report" or "Report").[15] The Report confirms that there are insufficient EA Licenses to accommodate the licenses purchased at auction (CTO Report, p. 15). "Simply put, 430 channels were purchased [at auction by holders of EA Licenses] in each of the 175 BEA markets during the auctions and only 280 channels (not including the 40 channel Guard Band) are to be made available in the 800 MHz band to accommodate them." *Id.*

The Puerto Rico market demonstrates this shortfall in spectrum to relocate Preferred's licenses. Preferred holds 125 800 MHz SMR General Category ("GX") EA-Licensed frequencies (Channels 1-125). High Tech Communications Services, Inc. ("High Tech") holds the A Frequency Block license (Channels 401-420). North Sight Communications, Inc. ("North Sight") holds the C Frequency Block license (Channels 481-600) in this EA market. Under the Reconsideration Order, High Tech would be allowed to remain in the ESMR portion (817-824 MHz/862-869 MHz) of the Private Land Mobile Radio Band ("PLMRB" or the "Band") if it constructs a cellular architecture system. Since the Commission considered North Sight to have constructed a cellular architecture system on or before November 22, 2004, the FCC determined that North Sight was entitled to

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15 Attached as Exhibit 1 is a copy of the CTO Report, which has been refiled today as an *ex parte* filing in WT Docket 02-55.

remain in the ESMR portion of the PLMRB.[16] Nextel holds the B Frequency Block license (Channels 421-480). However, it holds only nine clean channels within this Frequency Block that cover the entire island of Puerto Rico. It is within this context that the relocation of licenses must occur.

Under the Rebanding Orders, Nextel exclusively is granted the former NPSPAC Channels (821/866 MHz - 824/869 MHz) and 10 MHz in the 1.9 GHz Band (1,910-1,915 MHz/1,990-1,995 MHz). Preferred is entitled to elect to move its 125 EA-Licensed frequencies to the ESMR portion of the Band. Its EA Licenses are entitled to move on a geographic "footprint" basis. Given that Preferred would be deemed to hold its 125 EA channels on a clean basis it would be entitled to have such channels relocated on such basis. However, given that the High Tech and North Sight EA Licenses are allowed to remain in the ESMR portion of the PLMRB and Nextel is exclusively reserved the former NPSPAC Channels and the 10 MHz of 1.9 GHz Band spectrum in this EA market, Preferred would not receive comparable facilities. In this EA market Nextel has a total of only 60 EA-Licensed Channels. Nine of the available channels are clean on an island-wide basis. North Sight Communications, Inc.'s 16 GX and Lower 80 Channels would move into these 60 Channels. As a result, Preferred would lose 81 total channels (125-44 = 81). It also would lose geographic coverage with respect to 63 additional channels

Further, as noted above, the same spectrum shortfall applies to the Site Licenses. The CTO Report confirms Preferred's previously stated contention that Nextel lacks sufficient channels within channels 121-400 to accommodate every non-Nextel site-based licensee affected by the relocation imposed by the Rebanding Orders (CTO Report at 2). The CTO Report specifically examines two major cities. In Boston, Massachusetts, there are 119 channels owned by various licensees that cannot be accommodated. (CTO Report at 3, 11). In Miami, Florida, there are 106 channels

16 North Site also benefits from the relocation of the underlying Site licenses in its C Frequency Block license.

licensed to various entities that cannot meet the 70-mile coordination requirement and thus cannot be accommodated. (CTO Report at 3, 11).

Indeed, with respect to the Site Licenses, Nextel lacks sufficient channels in thirty-eight (38) EA markets in which 103.18 million persons, or thirty-six percent (36%) of the total U.S. population lives, to provide relocated licensees comparable facilities on a channel equivalent basis.[17] Using a 35-mile radius, CTO concluded that there is a channel shortage in 67 of the 578 cities examined. Using a 70-mile radius only 289, or one half of the 578 cities examined, would be able to use high site stations in a portion of the area surrounding the city center because of the potential for co-channel interference. As Preferred has previously demonstrated, Nextel simply lacks the spectrum to accommodate a relocation of Non-Nextel Site-Licensed channels from Channels 401-600 downward to the Interleave Channels as well as relocating similar Site-Licensed channels from the General Category channels into the Interleave Channels.[18] The Supplemental Order aggravated this situation by adding Non-Nextel and Non-Southern EA-Licensed Channels to the proposed downward relocation from Channels 401-600. Nevertheless, as outlined in the CTO Report, the 280 channels set aside (not including the 40 channel Guard Band channels for 401-440) cannot accommodate the 430 BEA channels purchased at auction. (CTO Report, p. 3). Thus, there cannot be "comparable facilities" reserved for relocation of non-Nextel EA licensees, such as Preferred, in the portion of the ESMR band (channels 441-600).

Moreover, even the manner of implementing the rebanding process – separate and apart from the clear lack of available, comparable spectrum to accomplish the swap of frequencies – is compounded by the Commission's lack of reliable data upon which to base the change, so that no

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17 See CTO Report, p. 11, Table 1. This clearly distinguishes Preferred from the conclusion that the Wireless Bureau reached in denying a stay to Mobile Relay Associates and held that Mobile Relay had not adequately demonstrated harm. *Improving Public Safety Communications in the 800 MHz Band (Order Denying Stay)*, DA 05-82, released Jan. 14, 2005 (Wireless Tel. Bur.), at ¶ 14. Preferred has demonstrated that there are simply not enough channels to accommodate the relocation sought to be effectuated by the Rebanding Orders.

18 *See* CTO analysis attached as Exhibit A to the Preferred Petition for Reconsideration, filed December 22, 2004.

licensee can be assured of receiving comparable spectrum to replace that being lost in rebanding. Effecting the changes requires that Preferred establish accurately what were the "originally licensed" contours (as defined in Section 90.693 of the Commission's Rules) of incumbent licensees (i.e., Nextel Communications, Inc. and others) in Preferred's EAs. Publicly available information (e.g., through the FCC's Universal Licensing System database and Transition Administrator database) does not provide sufficient information to determine the "originally licensed" contours, principally because these data do not predate the year 2000. Yet many of the incumbent licenses were issued well before that date. Further, when additional data was requested from the Commission regarding its own records, in response to a Freedom of Information Act Request filed by Preferred, the Commission provided incomplete data to be able to determine the proper contours of protected licenses, which prevents Preferred from accurately determining its licensing rights and what incumbent licenses it must protect and to what degree.

Unless the rebanding process is halted now pending judicial review of the Rebanding Orders, it will be impossible to reverse or significantly alter the procedure once it has proceeded much further. In EA markets in which Preferred holds EA and/or Site-Licensed channels, if rebanding is allowed to proceed as set forth in the several Rebanding Orders, the Company will encounter either loss of total frequencies or spectrum rights, or both, because of the shortfall of spectrum to provide comparable facilities to which Preferred is entitled, either of which deprives Preferred of the full use of the spectrum that it acquired at auction. This is a direct injury flowing from the Rebanding Orders. With Nextel lacking total frequency and matching sites and geographical coverage footprints, the Commission lacks the legal authority (without comparable facilities the Commission cannot involuntarily relocate licensees without their consent) to redress Preferred's injuries since other licensees, including Nextel and its affiliates, would need to agree or consent, something unlikely to occur. Thus, once unleashed the process causes not only injury to

Preferred, but also will prove resistant to any remedy that might be fashioned. Such irreparable injury compels grant of the stay.

ARGUMENT

The Standards For Grant Of A Stay Are Clear And Well Established And Compel A Stay of the Commission's Rules Adopted in the Supplemental Order Pending Judicial Review

A stay pending the outcome of another proceeding is appropriate when (1) the party seeking the stay will be irreparably injured without the stay; (2) the party seeking the stay is likely to prevail on the merits of its appeal (or upon later reconsideration of its case by the Commission); (3) the issuance of the stay will not substantially harm other interested parties; and (4) grant of the stay is in the public interest. *Virginia Petroleum Jobbers, supra*; *National Cable Television Ass'n v. F.C.C.*, 479 F.2d 183 (D.C. Cir. 1973). A party not need meet all four prongs of the test equally to obtain a stay. "[A] particularly strong showing on one factor may compensate for a weak showing on one or more of the other factors." *Morgan Stanley DW, Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001) (citing *Serono Labs. V. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)).

> For instance, as to the first factor, the court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, the court may grant an injunction even though its own approach may be contrary to the movants' view of the merits. The necessary level or degree of possibility of success will vary according to the court's assessment of the other factors.

Id. (citing *New Mexico v. Richardson*, 39 F. Supp. 2d 48, 50 (D.D.C. 1999) (internal quotation marks and alterations omitted). A stay to "maintain[] the status quo is appropriate where a serious legal question is presented . . . whether or not movant has shown a mathematical probability of success." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

Failure To Grant Stay Would Irreparably Harm Preferred and Similarly Situated Licensees

The irreparable injury that threatens the Company compels a tolling of the rules adopted in the Supplemental Order. *Virginia Petroleum Jobbers, supra.* The harm that the Company will suffer is unquestionably "irreparable." Once the Commission has forced the rebanding of the EA licenses,

Preferred will have no remedy at law to compensate for what will be unrecoverable losses – the serious reduction or even wipeout in value of licenses for which Preferred paid the FCC nearly $32 million in reliance on rules adopted by the agency -- if the rules and rebanding process already underway are not stayed. As noted at length above, not only is there insufficient spectrum available, there also is not sufficiently accurate data available from the FCC concerning what license area "remains" for Preferred in its EAs as a result of rebanding. This presents Preferred with the likelihood of the loss of a significant portion of the value of its licenses. It is well established that a loss of this magnitude is irreparable. In *Wisconsin Gas, Inc. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985), the Court said that "monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." With the rebanding process already underway, this constitutes an irreparable injury likely to occur. *Reynolds Metals Co. v. F.E.R.C.*, 777 F.2d 760, 763 (D.C. Cir. 1985), citing *Washington Metro. Area Transit Comm'n, supra*, 559 F.2d at 843 n.3 (finding that irreparable injury must be "likely" to occur).

Moreover, the failure to grant a stay, in light of the insufficient amount of spectrum to allow for the rebanding, which would result in Preferred and other EA and Site License holders being forced off their spectrum without receiving comparable spectrum, is already underway as of June 27, 2005 in Preferred's case. Failure to grant a stay would likely preclude the Court's being able to grant an effective remedy in reversing the FCC's action. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995) (a stay is appropriate when failure to grant it would impair the court's ability to grant an effective remedy).

Further, the injury being caused to Preferred exceeds the mere expenditure of funds in connection with seeking an appeal and as such is not of the type of "economic injury" deemed insufficient to warrant a stay under *Virginia Petroleum*. "The economic injuries disparaged in that case were the necessary expenditure of funds pending appeal and the temporary monetary losses for

which 'adequate compensatory or other corrective relief will be available at a later date.'" *Washington Metro. Area Transit Comm'n*, 559 F.2d at 843 n. 2 (quoting *Virginia Petroleum*, 259 F.2d at 925).

The threat of such unrecoverable economic loss clearly qualifies as irreparable harm. *Iowa Utilities Board v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1997). Therein the Eighth Circuit granted a stay lest local exchange carriers be forced to charge below-cost rates. Preferred cannot simply bring suit to recover damages. *Compare National Ass'n of Broadcasters v. F.C.C.*, 554 F.2d 1118, 1122 n. 3 (D.C. Cir. 1976).[19] Like the incumbent local exchange carriers who would not be able to bring suit to recover their loss and thus found entitled to stay by the 8th Circuit, *Iowa Utilities*, 109 F.3d at 426, Preferred will not be able to recover business damages from the Commission for the damages to its authorizations for which it paid the FCC nearly $32 million in reliance upon the rules and policies in effect at the time of the auction of the EA Licenses.[20] Accordingly, the nature and magnitude of the harm that presently threatens Preferred overwhelming tips the scales in favor of a stay.

Preferred's Petition is Substantially Likely to Succeed on the Merits or, at a Minimum, Raises Serious Legal Questions

It is the intention of Preferred to seek judicial review of the Rebanding Orders once public notice of the latest reconsideration order occurs.[21] Preferred is substantially likely to succeed on the merits of its petition for review. However, at a minimum, Preferred's petition for review raises serious legal issues that warrant a stay pending this Court's review. *Washington Metro. Area Transit*

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19 In *NAB*, the licensees could sue to recover the fees paid to the FCC. In the instant case, suit for money damages would not be sufficient to replace licensees lost because of the Commission's error.

20 *See Toomer v. Witsell*, 334 U.S. 385, 391-92 (1948) (no adequate remedy at law where government immune from suit for commercial losses).

21 Moreover, the original Rebanding Order and Supplemental Order are already the subject of a petition for review before the D.C. Circuit. *Mobile Relay Assoc. v. F.C.C.*, No. 04-1413 (filed Dec. 6, 2004).

Comm'n, 559 F.2d at 844 (maintaining the status quo is appropriate where a serious legal question is presented . . . whether or not movant has shown a mathematical probability of success).[22]

The grant of exclusive spectrum rights in the Rebanding Order in the 1.9 MHz band to Nextel, combined with the grant in the original Rebanding Order and at the expense of other commercial mobile radio service providers like Preferred, is arbitrary and capricious because it constitutes unequal treatment of similarly situated parties. In addition, the decision of the Commission in the Supplemental Order adopting a different regulatory treatment of certain commercial mobile radio service providers is arbitrary and capricious because the evidentiary record in the proceedings below does not support the basis upon which the Commission has justified this different regulatory regime.

The Commission's substantially disparate treatment of Nextel and related parties on the one hand and Preferred and other EA licensees on the other is precisely the kind of arbitrary and capricious treatment that the reviewing courts have prohibited the Commission from doing. In *Green Country Mobilephone, Inc. v. F.C.C.*, 765 F.2d 235, 237 (D.C. Cir. 1985), the Court warned, "a 'sometime-yes, sometimes-no, sometimes-maybe policy ... cannot be squared with our obligations to preclude arbitrary and capricious management of [an agency's] mandate'." *See also McElroy Electronics Corp. v. F.C.C.*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *Melody Music v. F.C.C.*, 345 F. 2d 730 (D.C. Cir. 1965).

Further, Preferred will be able to demonstrate that the Commission has engaged in prohibited retroactive rulemaking as a result of the imposition of the Cellular Deployment Test[23] by

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22 In a similar vein, prior to its *Virginia Petroleum Jobbers* decision, this Court concluded that there were serious legal questions presented meriting where the Commission was confronting a restructuring of spectrum allocations and modifications of licensees as it considered "cleaning up" a frequency band as it is doing in this case. In *Greylock Broadcasting Company v. U.S.*, 231 F.2d 748 (D.C. Cir. 1956), where the Commission was in the middle of consideration of its "deintermixture" proceeding (whether to allocate only VHF or UHF stations in any market) in conjunction with the irreparable harm that would result from financial losses for UHF broadcasters fearing conversion of market to a VHF market, the serious legal questions posed regarding public uncertainty about television receivers justified postponing new VHF allocation in a heretofore UHF television market. *Id.* at 750-51.

the Supplemental Order upon certain EA licensees, such as Preferred. The effect of this Cellular Deployment Test is to deprive Preferred and similarly situated EA licensees of rights previously granted them under the rules for their licenses in effect at the time that Preferred bid in the Commission's auction for the EA licenses, and which conditions are not being imposed on other EA licensees under the Supplemental Order. For instead of reducing the Non-Nextel EA licensees' total frequencies, the Commission confiscated the right that Preferred and others had purchased at auction to recover underlying "white space" under Section 90.683[24] of the FCC Rules and reversed its decision to allow such EA-Licensed Spectrum to move into the new ESMR portion of the 800 MHz Band on an EA market on an equivalent 1 to 1 basis. Under the Supplemental Order, the FCC determined that unless this Spectrum had been constructed as part of an ESMR system as of November 22, 2004, it would move into the ESMR portion of the 800 MHz Band only upon a matching geographical footprint basis.

The changes wrought by the Supplemental Order, as confirmed by the Reconsideration Order, are clearly "retroactive" – and not merely reliant on past facts – because they increase liability for past conduct, i.e., the cost of having relied upon the rules in effect when Preferred and similarly situated parties purchased their licenses from the Seller/FCC with certain expectations as to what would be the coverage area and rules governing their use. *See Landgraf v USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1503 (1994) (a rule may be retroactive if it increases a party's liability for past conduct); *DIRECTV, Inc. v F.C.C.*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf*) (or imposes new duties and obligations with respect to a completed transaction, such as the SMR auction). Such a retroactive action restricting the rights of license holders who purchased spectrum at auction is prohibited by the Administrative Procedure Act, which expressly limits a rule to law or

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23 47 C.F.R. § 90.685(b), as modified by the Supplemental Order.

24 47 C.F.R. § 90.483, as in effect prior to adoption of the Supplemental Order.

policy of future effect,[25] especially where, as here, the retroactive effect has the impact of rendering "worthless substantial past investment incurred in reliance upon the prior rule." *Bowen v Georgetown Univ Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring).[26]

The FCC's retroactive adoption of the Cellular Deployment Test has immediate, negative consequences for the value of Preferred's investment, which Preferred made in detrimental reliance on the Commission's rules as in effect when it acquired its licenses in the SMR auction.[27] The Commission has failed the test that "when there is substitution of new law for old law that was reasonably clear, the new rule may justifiably be given prospectively-only effect in order to protect the settled expectations of those who had relied on the preexisting rule." *Williams Natural Gas Co v F.E.R.C.*, 3 F.3d 1544, 1554 (D.C. Cir. 1994) (citations omitted).

The Public Interest Would Be Served By Stay of the Arbitrary and Capricious Rules Adopted in the Supplemental Order

The public interest is served by staying a process that will ultimately work to the detriment of the public's interest in safe, reliable communications in the 800 MHz band. Public safety agencies acting as first responders in emergency situations – supposedly the beneficiaries of this rationalization of the SMR frequency bands, have already been among those petitioning the agency for a halt to the process.[28] Moreover, as Preferred itself has advised the Commission in an *ex parte*

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25 47 U.S.C. § 551(4).

26 Contrast the holding in *Celltronix v F.C.C.*, 272 F.3d 585, 588 (D.C. Cir. 2001), where the D.C. Circuit concluded that "It seems impossible to characterize the rule change here as "altering the past legal consequences" of a past action. It altered the *future* effect of the initial license issuance, to be sure, but that could not be viewed as "past legal consequences." By contrast, in the case of Preferred, the Commission's actions such as the Cellular Deployment Test retroactively imposed a date by which Preferred would have had to provide full ESMR service, which imposes a new burden on licenses that Preferred had previously purchased from the Commission without such an obligation and impaired Preferred's rights with respect to its spectrum on a transaction already completed, i.e., the purchase at auction of the licenses with certain expectations expressly created by the Commission and upon which Preferred relied. *See Landgraf*, 511 U.S. at 293 n.3.

27 Further, the Commission did not rely on its authority to modify a license under Section 316 of the Act when it imposed the new conditions of the Cellular Deployment Test on licensees. 47 U.S.C. § 316.

28 *See* note 2, *supra.*

filing, such emergency service providers are greatly concerned that the process will result in SMR facilities in neighboring jurisdictions being incapable of coordinated communications as a result of the chaos of the rebanding process.[29] It is in the public interest to resolve outstanding questions involving the licenses and procedures for rebanding prior to public safety agencies' having to spend considerable sums of money, where there is no reasonable certainty that the rebanding process can be properly completed given the provisions of the Supplemental Order.

Aside from the giants like Nextel, the holders of EA and Site Licenses are generally small businesses working to implement a consolidated business plan and seeking entry into the competitive telecommunications marketplace. As such, by the Commission's own admission, they face a continuing array of entry and other barriers not confronted by large, established telecommunications enterprises.[30] Under Section 257 of the Act, the Commission has an independent obligation to seek to eliminate regulatory barriers to entry "for entrepreneurs and other small businesses in the provision and ownership of telecommunications services... "[31] The public interest is thus served by the Commission's aiding, rather than abetting, the efforts of such small businesses to overcome barriers to competition, in accordance with the mandate of the Act.[32]

No Party Will Not Be Harmed By Maintenance of the Status Quo Pending the Resolution of Preferred's Petition for Review

No interested party will suffer substantial harm if the subject request for stay is granted. As an initial matter, there would be no harm caused Nextel, the principal party beneficiary of the new rules. Nextel, will not lose any spectrum or licenses as a result of the stay pending

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29 *Spectrum Shift Threatens Radio Communication*, Washington Post, Page B7 (Jul. 11, 2005).

30 *See generally In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), FCC 97-164*, 11 FCC Rcd 16802 (1997).

31 47 U.S.C. § 257.

32 *Id.*

judicial review of the rules under review. The same could not be said of Preferred if there were no stay granted.

Moreover, the real "harm" would occur if when the court has decided to remand the Rebanding Orders, the rebanding process would have already advanced substantially, which would entail "unscrambling the egg" caused by the rebanding process. As Preferred has repeatedly demonstrated, most recently in the updated CTO Report, there is not enough frequency with which to compensate licensees like Preferred that must be relocated. Further, there is considerable doubt about the reliability of the data being used by the Commission to determine what are protected areas and available frequencies to which to migrate.

Finally, no party has a vested interest in the loss of value of the licenses of another competitor, just as they have none in the disqualification of an applicant or forfeiture of an authorization. *See generally Allegria I, Inc. v. F.C.C.*, 947 F.2d 986 (D.C. Cir. 1991) (no prejudice to party from action that returns all parties to status quo); *Crosthwait v. F.C.C.*, 584 F.2d 550, 555 (D.C. Cir. 1978) (an applicant has no vested interest in the disqualification of a competing applicant).

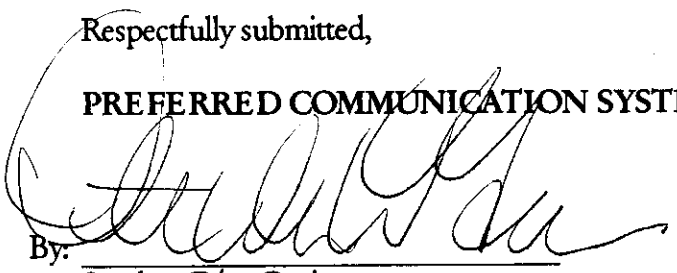
CONCLUSION

Preferred has demonstrated that there are substantial legal questions presented about the legality of the rules adopted by the Rebanding Orders, including whether there has been a prohibited retroactive imposition of new obligations on licenses purchased at auction under substantially different rules. Further, Preferred has demonstrated that it will suffer an irreparable injury from the relocation process because there is insufficient spectrum to accommodate it and all other licensees forced to move to accommodate Nextel and related parties. In addition, the public interest will be served by delaying what would otherwise be a costly doing and then undoing of a rebanding process if the rules do not withstand judicial review. Finally, no private party will be harmed by delay in implementation of the rebanding process. For the foregoing reasons, Preferred

respectfully requests that the Commission stay the rules adopted in the Rebanding Orders until disposition of judicial review of the Rebanding Orders.

Respectfully submitted,

PREFERRED COMMUNICATION SYSTEMS, INC.



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Dated: November 9, 2005

EXHIBIT 1

Analysis of the Impact of 800 MHz Rebanding

"PROFESSIONALS PUTTING GOOD IDEAS TO WORK"

Analysis of the Impact of 800 MHz Rebanding

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